

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE YOUNG,

Defendant-Appellant.

UNPUBLISHED

September 18, 2007

No. 267084

Wayne Circuit Court

LC No. 04-018846-01

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for refusal to pay child support, MCL 750.165. Defendant was sentenced to two years' probation for his conviction. For the reasons set forth in this opinion we affirm defendant's conviction and sentence.

Defendant and Daronya Schearer are the parents of Janay Young. In 1994, defendant was ordered to pay \$42 a week for child support and 90 percent of the minor's medical expenses. At the time of trial, defendant owed \$13,000 in back child support, and when taking into consideration what defendant owed Medicaid, Schearer and Wayne County, the total amount owed was \$27,039.

Defendant first argues that the trial court erred when it failed to obtain a knowing and valid waiver of his right to counsel. Because this issue is unpreserved, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Before granting a defendant's request to waive counsel, the trial court must determine if: (1) the defendant's request is unequivocal, (2) the defendant is asserting the right knowingly, intelligently, and voluntarily after being informed of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. *People v Willing*, 267 Mich App 208, 219-220; 704 NW2d 472 (2005), citing *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Additionally, the court must comply with MCR 6.005(D), which requires that the court: (1) advise the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offer the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an

appointed lawyer. *Willing, supra* at 220. To constitute as a valid waiver of a defendant's right to counsel, the trial court must comply with the three *Anderson* factors and MCR 6.005(D). *Willing, supra* at 220. "It is a long-held principle that courts are to make every reasonable presumption against the waiver of a fundamental constitutional right, including the waiver of the right to the assistance of counsel." *People v Russell*, 471 Mich 182, 188; 684 NW2d 745 (2004).

Based on the record provided, we conclude that the trial court erred when it allowed defendant to waive counsel. Shortly before jury selection, defendant informed the court that he wished to retain counsel of his choice in this matter, but he was unable to do so because of a lien on his assets. The court inquired into defendant's claim that he wished to seek counsel but limited funds prevented him from doing so. During this time the court asked defendant, "do you want a lawyer to help you with this case, other than the lawyer here?" Defendant replied, "I wanted to go out and seek the proper counsel, yes."

Based on the trial transcripts, it is clear that defendant wished to retain counsel but he represented himself because he was unable to retain the counsel of his choice. MCR 6.005(E) provides:

If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings, (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or (2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

Although it is unclear if the court complied with the *Anderson* factors and MCR 6.005(D) when it initially allowed defendant to waive his right to counsel, at the start of subsequent proceedings the trial court was required to place on the record defendant's reaffirmation that a lawyer's assistance was unwanted. MCR 6.005(E). We find that the trial court erred when it allowed defendant to proceed with trial in propria persona after defendant made it known that he wanted the assistance of counsel. MCR 6.005(E). Even though defendant did not want the assistance of the court appointed counsel, defendant made it known that assistance was wanted.

While it is true that defendant was provided with standby counsel throughout the trial, "the assistance of standby counsel, no matter how useful to the court or the defendant, cannot qualify as the assistance of counsel required by the Sixth Amendment" because "the roles of standby counsel and full-fledged defense counsel are fundamentally different." *Willing, supra* at 227. "The presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards." *Willing, supra* at 228, quoting *People v Dennany*, 445 Mich 412, 446; 519 NW2d 128 (1994).

Even though we find that the trial court failed to conform to MCR 6.005(E), reversal of defendant's conviction is not required. Because the failure to comply with MCR 6.005(E) is

treated as any other trial error, defendant must show that the trial court's error affected his substantial rights. *People v Lane*, 453 Mich 132, 140; 551 NW2d 382 (1996).

Defendant has failed to show error requiring reversal. MCL 750.165, refusal to pay child support, is a strict liability offense, and the evidence clearly showed that defendant committed the offense for which he was convicted. *People v Adams*, 262 Mich App 89, 100; 683 NW2d 729 (2004). The evidence showed that defendant fathered a child with Daronya Schearer, and that a May 23, 1994, court order was issued requiring that defendant pay Schearer \$42 weekly in child support and 90 percent of their child's medical expenses. According to Schearer, defendant was delinquent in his child support payments. At the time of trial, defendant owed the state, Medicaid, Schearer, and Wayne County a total \$27,082.39 for back child support, surcharges, fees, and birthing expenses.

Although the court failed to follow MCR 6.005(E) the error was not outcome determinative. Because the evidence overwhelmingly proved that defendant was delinquent in his child support payments, thus violating MCL 750.165, defendant has failed to show error requiring reversal.

Defendant next argues that the trial court erred when it denied his request for a continuance. Because this issue is unpreserved our review is for plain error affecting defendant's substantial rights. *Carines, supra* at 764.

"The right to counsel is considered fundamental because it is essential to a fair trial and attaches at the trial stage, which is clearly a critical stage of the proceedings." *Russell, supra* at 187-188. When determining whether a trial court properly denied a defendant's motion for a continuance to obtain another attorney, this Court should consider the following factors: (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).

Although defendant argues that the trial court improperly denied his request for a continuance, we are unable to conclude that defendant requested a continuance at anytime throughout trial. Before trial commenced, the trial court and defendant discussed defendant's claim that he was prevented from retaining the counsel of choice because a lien was placed on his assets. However, the record fails to show that defendant requested a continuance so that he could proceed with different counsel. The record fails to show that defendant submitted a written motion or made an oral motion for a continuance. "In the absence of a request for a continuance, a trial court should assume that a party does not desire a continuance" and "the trial court cannot be faulted for failing to grant a continuance on its own motion." *People v Elston*, 462 Mich 751, 764-765; 614 NW2d 595 (2000). Because the record fails to show that defendant requested a continuance, no error has occurred.

Defendant also argues that the trial court erred when it denied his request for a new trial judge. We review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 764.

Judicial disqualification is proper if a judge cannot impartially hear a case. MCR 2.003(B). “Absent actual personal bias or prejudice against either a party or the party’s attorney, a judge will not be disqualified.” *Wells, supra* at 391. To challenge a judge for bias a party must overcome a heavy presumption of judicial impartiality. *Wells, supra* at 391.

After reviewing the record, we find that defendant has failed to demonstrate grounds for judicial disqualification. Defendant argues that the court expressed bias when it stated:

[Mr.] Young, we’re going to have that witness for you. And I don’t want another hour and a half with the witness. You’ll [sic] to have prepare yourself to be more concise and get the case in.

Judge Brown’s comment to defendant to be more “concise” when presenting his case was not indicative of either bias or partiality. The comment was made outside of the presence of the jury and its intent was to promote judicial expediency and efficiency. “Comments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality.” *Wells, supra* at 391. For that reason, defendant has failed to show judicial bias.

Although defendant further argues that Judge Brown expressed bias against him because she failed to recognize his claim of sovereign immunity and she denied his request to go before the chief judge, defendant fails to support his claims with any factual or legal support. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004), citing *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). We therefore determine this issue has been abandoned on appeal and furthermore opine that it is not worthy of further comment from this Court.

Defendant further argues that the trial court erred when it denied him the right to call witnesses. A trial court’s evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

“An accused in a criminal prosecution has the right to compulsory process for obtaining witnesses in his favor.” *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1988). However, “a criminal defendant’s right to compulsory process is not absolute, and the constitution does not grant the right to subpoena any and all witnesses a party might wish to call.” *Loyer, supra* at 112-113.

Defendant argues that the trial court improperly refused to exercise its compulsory process powers regarding three potential witnesses, Judge James Rashid, Connie Nicks and Cynthia Sherburn. Although defendant argues that Judge Rashid, a retired Circuit Court Judge, would have testified to the issuance of the child support order and whether defendant had knowledge of that order, the order itself was permitted into evidence and testimony was presented which showed that defendant was aware of the child support order and his obligation to pay. As noted by the trial court, a court speaks through its written orders and not through its oral pronouncements. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). Because defendant was permitted to introduce the support order into evidence, any testimony offered by Judge Rashid regarding the order would have been unnecessary.

The trial court also properly denied defendant's request to compel Nicks to testify. Defendant argues that Nicks, an employee of the Attorney General's Office, would have testified regarding the lien placed on his assets. However, because Garber, a record keeper for the Third Circuit Court, testified extensively about the lien on defendant's assets, any testimony offered from Nicks would have been repetitive and unnecessary. Defendant cross-examined Garber about the lien on his assets and the circumstances surrounding the lien. Because it appears that Nicks would not have offered any additional testimony on this matter, the trial court properly denied defendant's request to compel Nicks to testify.

The trial court also properly denied defendant's request to compel Sherburn to testify. Sherburn, a judicial assistant for the court, conducted research on defendant's claim of sovereign immunity, which defendant claimed was "fraudulent research." Defendant argues that Sherburn would have testified regarding the issue of jurisdiction; however, defendant fails to elaborate on his claim. Defendant fails to provide this Court with a means of addressing this issue. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Matuszak, supra* at 59.

Although defendant argues that he was denied his right to present a meaningful defense because the court denied his request to compel Judge Rashid, Nicks and Sherburn to testify, defendant fails to show that these witnesses were material to his case. In any event, defendant fails to show by an affidavit or offer of proof what these witnesses would have testified to and he fails to show that there is a reasonable probability that the testimony would have altered the outcome of the trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). For the reasons stated, defendant's claim is meritless.

Finally, defendant argues that the strict liability provision of MCL 750.165 is unconstitutional. We review defendant's unpreserved constitutional challenge for plain error. *Carines, supra* at 764.

MCL 750.165 provides for strict liability. *Adams, supra* at 100. "A strict-liability crime is one for which the prosecutor need only prove that the defendant performed the act, regardless of intent or knowledge." *Adams, supra* at 91. In *People v Westman*, 262 Mich App 184, 190-191; 685 NW2d 423 (2004), overruled in part on other grounds 474 Mich 48 (2006), this Court found that, even though MCL 750.165 is a strict liability offense, it does not violate a defendant's right to due process. This Court held that "laws enacted for the public welfare 'do not require a criminal intent because the accused generally is in a position to prevent the harm.'" *Westman, supra* at 191-190 (citation omitted). This Court further held that the state's police power included the power to regulate for the social good, and that the "defendant was in a position to prevent the harm by complying with or seeking modification of the court order directing him to pay child support." *Westman, supra* at 190-191.

Just as in *Westman*, defendant was in a position to prevent the harm by complying with MCL 750.165. *Westman, supra* at 190-191. Because defendant failed to prevent the harm, defendant's right to due process was not violated. *Westman, supra* at 190-191.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Christopher M. Murray